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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 76.

UNITED STATES OF AMERICA,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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THE COURT PRESS, N. Y. C.

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BRIEF FOR RESPONDENT.

The substantially accurate statement in the Government's brief (pp. 1 to 5) respecting the proceedings in this case in the District Court and the Circuit Court of Appeals requires but one further preliminary statement by respondent. In the ensuing references, *en bloc*, to the items of cost and expense offered to be proved at the trial as having been incurred in taking down and removing the storage bins and other equipment and for assembling, packing and removing respondent's inventory of parts, machinery and other belongings, under the compulsion of vacating the property at once for the Government's temporary use for only one year of the unexpired six year term of respondent's lease, it is not intended to claim that each and every item offered in evidence is free from all objection to admissibility in evidence. If any or some, though not all, of the items of such cost and expense would be received in evidence, the Circuit Court of Appeals decision, that it was error for the District Court to limit the compensation allowed to

respondent by the jury's verdict to the fair value of the vacant space and to exclude any allowance whatever for the actual cost and expense directly incurred by it in vacating the condemned property, still presents the basic question whether such cost and expense are to be considered as a factor in the determination of the just compensation to which respondent is entitled.

Summary of Argument.

§ I.

On a fair and sound application of the principle that the condemnee is entitled to be put in as good position pecuniarily as he would have been if the condemnation had not taken place, a lessee of property occupied and used under a lease for a term of years, upon Government condemnation for its own temporary use for a period less than the unexpired lease term, is and should be accorded the right and opportunity to prove, as a factor to be considered in the determination of the just compensation to which the condemnee is entitled, the cost and expense of demolition and removal of equipment, facilities and belongings from the property at the Government's direction for its immediate use. Such cost and expense represent loss and damage produced directly by the fact that the Government condemned the temporary use of the property, particularly since respondent will be compelled, upon termination of the Government's temporary use, to reoccupy the property under the lease and eventually to move out again upon expiration thereof.

Despite the Government's effort, in its brief, to create an impression to the contrary, particularly in its over-reliance on this Court's decision in *Joslin Co. v. Providence*, 262 U. S. 668, the circumstances of this case present a question which is one of first impression in this Court. As far as the precise situation in this case is concerned, the conflict in lower court decisions is between

the Circuit Court of Appeals in this case and the courts in *Gershon Bros. Co. v. United States*, 284 Fed. 849 and *United States v. Building, etc.*, 55 F. Supp. 667. The result reached by the Circuit Court of Appeals in this case attains substantial justice in accordance with the principles underlying the determination of just compensation in condemnation cases, as against the contrary result reached in the other two cases, the latter of which dismissed the question with an unwarranted reliance on this Court's decision in *Joslin Co. v. Providence, supra.*

Other lower court decisions cited by the Government against respondent's right to be compensated for the dismantling and removal cost and expense in question, wholly in reliance on a naked generalization by the court that removal expense is not compensable, are for the most part rooted in an unwarranted acceptance of the decision in *Joslin Co. v. Providence, supra*, as authority for the conclusion; moreover, they involve dissimilar situations. (*United States v. Improved Premises, etc.*, 54 F. Supp. 469; *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258; *United States v. 0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562; *Futorsky, et al. v. United States*, 66 Fed. [2d] 215; *Potomac Electric Power Co. v. United States*, 85 Fed. [2d] 243.)

II.

The items offered in evidence by respondent are directed solely to proof of the loss and damage suffered by respondent by reason of the Government's condemnation of temporary use of the property, to the extent only of the cost and expense incurred by it in order to remove from the property and yield the vacant space to the Government immediately for its temporary use. Respondent does not seek, and the recovery of such cost and expense will not give it, any compensation whatever for loss or

frustration of the business if conducted on the condemned property, for loss of opportunities or profits, or for the value of the bins, equipment or inventory in place.

For that reason, allowance of compensation for the cost and expense of removal in the circumstances of this case is not at all precluded by the array of authorities, as formidable and imposing as it may appear to be, in support of the proposition urged by the Government (Brief, pp. 9, 16) that consequential or frustration damages are not compensable in condemnation cases. Since consequential damages, in the sense in which they are prohibited in condemnation cases, are not involved here, the absence from the statute (Second War Powers Act) of any express provisions regarding such damages is not a valid objection to respondent's right to compensation for cost and expense of removal; where, as here, the allowance of compensation is not dependent on express sanction in the statute but is governed by "just compensation" under the Fifth Amendment, the ascertainment of such compensation is a judicial function. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299.

III.

The true significance of the Government's objections lies in that which it has failed pointedly to say. The real reason for its objection to respondent's right to compensation for the loss represented by the cost and expense of dismantling and moving out its equipment is that, notwithstanding the Government's condemnation of the property for its own temporary use was directly and exclusively responsible for such loss, it considers itself as having received no specific or tangible benefit from the removal of something it did not turn to its own use. To that reason is traceable the motive for the irrelevant statement that neither respondent's "business nor its equipment and inventory have been taken." The right to use the warehouse

only has been taken" (Brief, p. 11). If disregards the settled principle that it is the condemnee's loss which determines just compensation (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *United States* v. *Miller*, 317 U. S. 369, 375), and it erroneously presupposes that just compensation for a loss not to be increased by reason of any specific gain to the taker will nevertheless be decreased to the extent of an absence of such gain to the taker.

Argument.

I.

Cost and expense of demolition and removal compelled by condemnation for temporary use are entitled to be considered in determination of just compensation.

Stripped to its essentials, the Government's position appears to be that, since it was interested only in acquiring the bare space it desired immediately for its own temporary use as a Signal Corps depot, compensation for the property taken by it should be limited to the fair value of the unoccupied space it ultimately received, to the exclusion of that element of value for what it took which is measurable by the loss involved in the cost and expense to respondent of removing its equipment, facilities and inventory, and delivering immediately to the Government the bare space it demanded. The Circuit Court of Appeals summarized the Government's case similarly (R. 91, 92).

The net result of the Government's concentration of attention on the unoccupied space it desired for its own use is to ignore completely the fact that its ultimate acquisition of the bare space for a year's use required first that respondent be dislodged from its own use and possession of property under a lease with an unexpired term of approximately five years after termination of

the Government's temporary use, at the cost and expense to respondent of temporarily vacating the premises for one year in order to make the unoccupied space available for the Government's use during that period, only to be compelled to incur the cost and expense, not only of re-occupying the property for the balance of the lease term after the condemnation period, but also of removal, again at the expiration of the lease term.

The Government's indifference to the loss inflicted on respondent by the condemnation in the circumstances of this case can be explained only as emanating from an undiscriminating intentness on the desirability of confining payment to the value of the bare space, without distinction between one case and another. Respondent submits that the result, as far as the situation in this case is concerned, is that the Government is in the position of arguing for an untenable application of the general principle, recently re-stated by this Court (*United States v. Miller*, 317 U. S. 369, 373, and *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266) as the controlling guide in approaching the problem of just compensation, that the just compensation provided by the Fifth Amendment to be paid for the taking of private property for public use "means the full and perfect equivalent in money of the property taken" and that the "owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken". It is difficult to recognize in the Government's position the equitable principles on which the doctrine of just compensation supposedly rests. *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 304; *United States v. New River Collieries Co.*, 262 U. S. 341, 343; *United States ex rel. T. V. A. v. Powelson, supra.*

If, in its desire to acquire unoccupied property for its own immediate and temporary use, the Government had condemned unoccupied space, respondent could not seriously dispute the proposition that the fair-market value of the unoccupied space would constitute just compensa-

tion for the loss of its right to such space as lessee. But the fact is that, when the property was condemned, respondent was, as it had been, occupying and using it. Its use of the space was physically embodied in the bins, the equipment and other facilities erected and, together with the inventory, employed in the business it conducted there. Its use of the equipment and facilities constituted an integral part of the property which it, as lessee of the premises, owned in the space. As the Circuit Court of Appeals said (R. 92): "* * * it was defendant's use which was condemned and not merely a one-year part of its term lease. * * * It may also be noted that defendant had something more than the right to use, as would be the case where the property of a lessee was unoccupied. Here, the right to use had been exercised and such right was merged in the actual and physical possession of the property. * * *"

Since the property was occupied and used by respondent the Government could not take the space for its own use without taking from respondent, over and above its right to the space as lessee, its possession and use, as physically exemplified by the bins and equipment. The expropriation of respondent's use and occupancy, under the compulsion of leaving the premises unoccupied, necessarily involved the dismantling and removal or destruction of the physical embodiment of such use and possession. Respondent's loss of use and occupancy to the Government's condemnation of temporary use of the property was accompanied by a call for speed; the Government accelerated respondent's activities in clearing the premises of all its equipment and property, to strip them down to vacant space, by referring to the necessity of using troops if the task was not accomplished within a given time (R. 54). Since the Government insisted upon immediate removal in any event, it is clear that the cost and expense of removal could not be avoided by storing the equipment and facilities in the property during the Government's use and occupancy of it, as in *United States*

v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261.[1] The alternative was to leave everything there and cast on the Government the burden of moving anything that encumbered the space it required for its own use out to the street. Had the Government cleared the requisitioned space it would have done so at its own cost, expense and risk; there would then have arisen no claim that respondent should be forced to reimburse the Government. Yet in substance its position now comes to the same thing. The expense of demolition and removal, for the accommodation of the Government, in justice must be borne by the Government and not by respondent. Else respondent is not made whole and the Government is unjustly enriched.

The process of yielding the possession and use of the space entailed the cost and expense of reducing the premises to the bare space required by the Government for conversion to its own use. Such cost and expense are plainly identified with the possession and use of which respondent was deprived by the Government's taking. The surrender of possession and use directly compelled by the condemnation of the temporary use of the space for the Government's purposes is directly, specifically and physically translatable into the cost and expense involved in turning over to the Government the space it required. Besides being capable of precise ascertainment, such damages are so integrally and proximately related to the use and possession of the property taken from respondent as clearly to constitute a loss sustained by it in the Government's expropriation of its use and possession of the property.

From the standpoint of the broad principles on which just compensation is predicated, all the considerations

[1] But the fact that the tenant's partitions and improvements remained in storage in the premises occupied by the Government did not deter the District Court from saying, as though it were deciding, that the tenant would receive no award for expenses in removing plant and equipment.

underlying the concept of the substantial justice which is concerned with making the condemnee pecuniarily whole are, in the circumstances of this case, in favor of respondent's right to compensation for the cost and expense of removal from the property taken by the Government for its own use. It is not a denial of the uncontested right on the part of the Government to condemn the use of the property, but rather an assertion of respondent's right to compensation for the value of what the Government did take, to say that respondent's right to the uninterrupted continuation of its use and possession of the property for the duration of its lease is an element of value, in addition to the market value of the bare space, which is measurable by the cost and expense incurred in the removal of the equipment and inventory physically embodying the use and occupancy extinguished by the condemnation of the property for the Government's own use. Payment of the market value of the bare space, comprising only part of the whole of what it took, does not compensate respondent for that element of value represented by the use and occupancy which it lost. As was said in *McMillin Printing Co.* v. *Pittsburg C. & W. R. Co.*, 216 Pa. 504, such loss may be considered for the purpose of determining market value.

If respondent's loss in respect of the use and occupancy taken from it is not, by itself, measurable by the same standard of fair market value as was used in determining the value of the bare space, it has a value readily ascertainable by reference to something closer to actuality than the extrinsic factors, such as the guess of experts, considered in the application of market value as a practical standard, namely, the specific and definite items of cost and expense actually and directly incurred in dismantling respondent's equipment and moving it, together with the inventory and other belongings, out of the property at the Government's direction. The decisions in which the standard of market value has been discussed and applied disclose nothing capable of justifying the

notion that fair market value is the exclusive measure. On the contrary, in the very process of applying the fair market value standard in the more frequent instances where the loss lent itself to such valuation because of the character of the condemnation, this Court has made it clear that it will create such working rules for arriving at just compensation as will assist in doing substantial justice between the parties, and it has sanctioned recourse to other data, as being appropriate for consideration, where the loss cannot be measured by the standard of fair market value normally applied. *United States* v. *Miller*, *supra*, 373, 374. If, as this Court said in that case, in an effort "to find some practical standard, the courts early adopted, and have retained, the concept of market value", it was in order to effectuate, and not to abrogate or stultify, the objective of putting the owner "in as good position pecuniarily as he would have been if his property had not been taken." To refuse to permit the items of cost and expense of removal incurred in this case to be considered as an element of compensable loss sustained by respondent, merely because the destruction of its use and occupancy is not measurable by the standard of market value applied in the ordinary case, would be to frustrate the attainment of the objective of making the condemnee pecuniarily whole.

Respondent's right to be made whole in respect of the cost and expense of removal from the property is accentuated by the temporary character of the Government's appropriation of the property for its own use. As far as the weight of the loss represented by the cost and expense of removal is concerned, respondent is in even worse position than the condemnee where the fee is taken or where the whole of the unexpired term of the lease is condemned. In this case, the termination of the Government's use and occupancy of the property several years prior to the expiration of respondent's lease in 1948 is responsible for one more loss, measured by the cost and expense of loss of the use and possession of the property,

than would be the case if the Government had condemned it for its own use for the remaining six years of the lease term, instead of only one. If the use had been condemned for the unexpired term of the lease, it would have been necessary that respondent move out of the premises once, in 1942 rather than at the expiration of the lease six years later. As the situation in this case actually stands, however, the condemnation for the temporary use of only one year means that, instead of moving out once and for all, in 1942 rather than six years later, respondent is obliged, by force of its obligation for the balance of the lease term, to move back again in order to reoccupy the property upon termination of the Government's temporary use, and then move out again several years later by reason of the expiration of the lease.

Since, in any event, respondent suffered a loss which would not have occurred but for the condemnation, this is fundamentally a plain case for putting it in as good position pecuniarily as it would have been if its use and occupancy had not been condemned, by allowing it to prove the cost and expense of taking down and moving out its equipment and facilities as a direct consequence of the destruction of its use and occupancy of the property. There is no issue in this case over any attempt on respondent's part to seek compensation for the value of the equipment and inventory which the Government says (Brief, p. 11) it did not take, since there is no dispute that the Government need not compensate respondent for the value of the equipment and inventory which it did not take for its own use. However, the simple justice which relieves the Government of an obligation to pay for the value of equipment and inventory it did not keep and use, or even for the value of respondent's use and occupancy as a business asset, requires that it bear the burden of the cost and expense of ridding the property of respondent's use and occupancy in order to reduce the property to the bare space it desired for its own use. It is consistent with the ends sought to be attained by the principle of

just compensation to compel the Government to do so. Such, in substance, is the conclusion reached by the Circuit Court of Appeals.

Affirmance of the decision of the Circuit Court of Appeals in this case by such a conclusion will not essentially disturb, and neither is it precluded by, this Court's decision in *Joslin Co.* v. *Providence*, *supra*, or the statement therein (p. 676) that "* * * Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute (2 Lewis on Eminent Domain, 3d ed., §728); and it was not an unconstitutional exercise of power for the legislature, in creating the right, to define its extent * * *."

The *Joslin* case did not concern the question of involuntary removal expense. The question there presented upon an application for injunctive relief involved an attack, under the Fourteenth Amendment, on a state statute which authorized a city to acquire land, machinery, interests and water rights necessary to a project of obtaining a supply of pure water. The statute contained a number of provisions concerning the basis upon which the city was to compensate owners of property taken for that purpose; one of them expressly allowed a mill owner the option between full compensation for the value of his machinery or to recover the reasonable cost of moving the machinery from the condemned property to a new location within the New England states and setting it up there. The owners of certain mill property affected by the condemnation assailed the statute on the ground, for example, that its provisions permitted "the owner of a business established prior to the passage of the act to recover for injury thereto, while withholding such compensation from one whose business has been established since" (p. 675), and further that in the provisions for compensation for removal of an owner's machinery, the statute made an unreasonable distinction between removal to one of the New England states and removal to some other area the owner

might prefer, as well as between owners before and after the date of the enactment of the law.

This Court was not called upon to, and in fact did not, decide anything, respecting the question of compensation for cost of removal, other than the question whether or not the provisions expressly defining the extent of the compensation created by the statute made for a reasonable classification within constitutional restraints, as is evidenced by the concluding clause in the statement just quoted, that "it was not an unconstitutional exercise of power for the legislature, in creating the right, to define its extent" (p. 676). Since the complete statement amounts to a generalization on the cost of removal from condemned land as an element of damage in a situation that was not before the Court, namely, where, because the condemnation statute contains no other provisions for compensation, the condemnee's right to just compensation under the Fifth Amendment will be judicially determined, it is not entitled to the dignity of a considered and authoritative pronouncement on the subject. Since the complaining mill owners were entitled under the express terms of the statute to full compensation for their land, buildings and machinery, it is hard to see how they were in a position to urge, against the constitutionality of the statute, that third parties might exercise an option as to removal that might be declined by them in favor of receiving compensation for the value of the machinery in place.

Even if it were regarded as, at most, some indication of a predisposition regarding the general question in the ordinary case, its value is clouded by the fact that the reference cited, 2 Lewis on Eminent Domain, 3d ed., Sec. 728, is hardly authoritative. It states "* * * but the damage to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." Passing by the extraordinary conclusion that damages to personal property are not recoverable (true if at all only under statutes like the one in Pennsylvania, giving an action in trespass

where personal property is taken or damaged) the footnote references show there is no such general rule. *Vide e. g., Philadelphia & Reading R. R.* v. *Getz*, 113 Pa. St. 214; *Chicago R. R.* v. *Hock*, 118 Ill. 587; *Atchison R. R. Co.* v. *Schneider*, 127 Ill. 144.

Indeed, the learned author in the preceding Section 727 says "* * * and a number of cases hold that cost of removal and interruption and damage to business may be recovered whether the whole or a part of a property be taken", citing, among others, *Chicago R. R.* v. *Hock*, 118 Ill. 587; *Atchison R. R.* v. *Schneider*, 127 Ill. 144; *Covington* v. *Piel*, 87 Ky. 267; *Grand Rapids* v. *Weiden*, 70 Mich. 390; *Commissioners* v. *Moesta*, 91 Mich. 149; *City of Detroit* v. *Brennan*, 93 Mich. 338.

The conflicting situation on the general question is well set forth in *McMillin Printing Co.* v. *Pittsburg C. & W. R. Co.*, *supra* (pp. 510, 511), cited by Lewis:

> "Whether, in an action by a tenant whose leasehold interest has been taken under the right of eminent domain, the cost of removing machinery used in the business in which he was engaged and losses directly resulting from interruption of the business can be considered, is a question on which the decisions are not harmonious. The market value of the land taken is the test universally applied in an action by an owner, and it is as accurate a measure of his loss as any that can be set up. What he is entitled to is the value of the land ascertained by a fair appraisement, and of this value the selling price of land similarly situated is *prima facie* the best evidence. But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensa-

tion, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

In Randolph on Eminent Domain, §253, the rule is thus expressed "* * * the issue presented by these conflicting opinions is somewhat difficult. The strict rule certainly shuts out loose evidence which might tend to embarrass the judgment of the tribunal. On the other hand a conservative application of the liberal rule will permit the tribunal to consider real injuries suffered by the owner as the direct result of condemnation * * *".

In any event, the statement of the general rule in the ordinary case loses such value as it may be considered to have, standing by itself, when the Court is confronted with a case which challenges any application of the rule to its own facts. Respondent urges, therefore, that *Joslin Co. v. Providence* should not be permitted to stand in the way of an original and thorough examination of the question in this case, and that the only effect of a conclusion in respondent's favor would be to refine the *obiter* statement in that decision.

The lower court decisions cited by the Government against recovery of cost and expense of removal present

the conflict to be resolved by this Court's consideration of the question in this case as one of first impression, but they contribute nothing of value to an analysis or determination of the question (*United States v. Improved Premises, Etc.*, 54 F. Supp. 469; *Potomac Electric Power Co. v. United States*, 85 Fed. [2d] 243; *Gershon Bros. Co. v. United States*, 284 Fed. 849; *United States v. Building Known as 651 Brannan Street*, 55 F. Supp. 667; *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261; *United States v. 0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562). They are characterized by a sweeping generalization that removal expense is not compensable, in most instances on the supposed authority of the statement in *Joslin Co. v. Providence, supra*, and in two instances (*Gershon Bros. Co. v. United States*, and *United States v. Building Known As 651 Brannan Street*) the condemnation was for a period less than the unexpired term of the condemnee's lease, as in the instant case, or less than his property interest. The decision of the Court of Appeals of the District of Columbia in *Futrovsky et al. v. United States*, 66 Fed. [2d] 215, also cited by the Government, neither discussed nor decided this question. The owner of the meat business conducted on the property condemned in that case claimed that, because certain refrigerating equipment had become part of the condemned realty and did not, as the Government contended, remain removable personalty, the Government should take and pay for it. The situation was the same as if, contrary to the fact, respondent in this case had claimed that the Government should take and pay for the bins or other equipment and facilities in place. In the *Futrovsky* case, probably because the owner did not ask to be compensated for the cost and expense of taking down and moving out the equipment which he claimed the Government should take as part of the realty, the court did nothing more than to suggest, and then only fleetingly, the question of compensation for the cost and expense of removal, in the statement (p. 217) "The in-

convenience and expense of removing a going business and its equipment from property so taken cannot be paid for directly, and cannot operate indirectly to change a chattel into real estate."

II.

Allowance of cost and expense of demolition and removal will not result in recovery of consequential damages.

Another ground of opposition by the Government in this case is that the result would be to permit respondent to recover consequential damages which are by rule interdicted in condemnation cases. The Government can hardly mean to be understood as quarreling with the right to prove a loss, to the extent of the cost and expense in question, which satisfies, as much as this does, every legalistic or technical test of provable loss, from the standpoint of its causal proximateness to and identity with the taking of the use and possession of the property. If it is consequential in that sense, it is because, like any allowable damage, it is the direct consequence of the act which gives rise to the right of compensation.

Nor, unless the Government has totally misconceived the character of the consequential damages which a condemnee will not be permitted to recover, can it seriously contend for an application of the prohibition to this case. The authorities relied on by the Government demonstrate beyond question that consequential damages mean compensation for the value of business profits or opportunities lost as a result of the condemnation, or for the value of an advantageous location taken, or for damage to the value of the use of adjoining property not taken, or for damage of the speculative and conjectural value of similar factors. *United States ex rel. T. V. A.* v. *Powelson*, *supra*, 281; *Mitchell* v. *United States*, 267 U. S. 341;

Bothwell v. United States, 254 U. S. 231; *Justin Co. v. Providence*, *supra*.

In this case it is abundantly clear that the compensation that would result from allowing proof of items of the cost and expense in question would not in any wise involve damages in that category. The proof that was offered in evidence was confined specifically and exclusively to the definite items of the cost and expense of taking down, demolishing in part and removing the equipment and facilities used in the occupation of the property and in its business there, in the process of yielding the property to the Government for its own use and possession. An award of compensation for that kind of loss will not give to respondent one penny for damage to its business or for the deprivation of opportunities for profit, or of an advantageous location, or for any other thing of that nature. If respondent suffered any "frustration" as a result of the condemnation of its use and possession of the property, then recognizing the difference between frustration and appropriation,[2] it has made no claim in that respect; it seeks compensation only for the cost and expense necessitated by the expropriation of its use and occupancy of the property.

Such damage is not at all consequential within the meaning or scope of consequential damages prohibited to a condemnee in the absence of provision therefor in the condemnation statute. It is wholly outside the category of consequential damages which are dependent, for allowance, on express sanction in the condemnation statute. The silence of the Second War Powers Act respecting the right of a condemnee to be compensated for a loss such as the condemnation imposed on respondent in this case is not a valid reason for barring respondent's loss from consideration as an element of the just compensation to which it is entitled under the Fifth Amendment and the ascertainment of which is a judicial function. *Seaboard*

[2] *Omnia Co. v. United States*, 261 U. S. 502, 513.

Air Line Ry. v. *United States*, *supra*; *United States* v. *New River Collieries Co.*, *supra*.

The objection concerning consequential damages is, therefore, in complete disregard of the absence of any element of loss or damage in this case other than the cost and expense of removal in question. The Government has elaborated and garnished its objection concerning consequential damages with a number of decisions as authority for a proposition which respondent does not, and in this case need not, controvert because the question of just compensation pertains here to the cost and expense of removal actually and directly required by the expropriation of its use and occupancy of the property for the Government's temporary use, not to loss, destruction or frustration of its business, nor to the value of the equipment and inventory it removed. To say, as the Government does (Brief, pp. 6, 16), that not all injuries and business losses suffered by a condemnee are recoverable within the meaning of just compensation, and to pretend to support such a statement by reliance on losses with which respondent's claim for compensation in this case is not concerned, proves nothing. Least of all does it prove anything to rely on *United States ex rel. T. V. A.* v. *Powelson*, *supra*, in this connection, because the purport of the majority decision was that, if a condemnee will not be compensated for destruction or frustration of a going business, the power company in that case could hardly expect recognition of a claim to indemnification for frustration of a project that had not developed beyond the stages of a prospective plan when its property was condemned for the national project, and that would have depended for its accomplishment on a power of eminent domain which had not then been exercised. That decision clearly does not support the Government's contention either that indemnification of respondent for the cost and expense of removal in this case would mean an award of consequential damages such as are not allowed in con-

demnation cases, or that respondent should not be compensated for the empty reason that not all losses are compensable. On the contrary, if that decision has any effect in this phase of the instant case, it gives point, by contrast, to respondent's position that allowance of its actual, direct and specifically provable loss is not open to the objection which bars recovery of damages for frustration or loss of business, or to the particular objection which closed the door to an award of the compensation claimed by the owner in the *Powelson* case.

III.

The loss is compensable even though the cost and expense of demolition and removal be deemed to represent no tangible gain to the taker.

If respondent is correct in its analysis of the Government's position, the Government means that the loss for which respondent seeks compensation would result in consequential damages only in the sense that recovery would make respondent pecuniarily whole in respect of a loss which was an incident, unfortunate for respondent, of the Government's acquisition of the unoccupied space for its own use.[3] It is an argument, in effect, that while the Government did condemn property used and occupied by respondent, it desired only the unoccupied space for conversion to its own temporary use, and that it did not derive any benefit or value from the expropriation of respondent's use or from the cost and expense of preparing the property for the Government's own use of the unoccupied space.

[3] It is submitted that this meaning is borne out by the Government's statement (Brief, pp. 11, 12) that "The fact that personal property must be moved is incidental to the taking of the warehouse in which it was placed. It is not a taking or damaging of such property."

The fact is that, in condemning the property which the respondent was using, the Government did expropriate respondent's use and occupancy and compel it, at the cost and expense in question, to vacate the property for the Government's purposes. Such a contention, therefore, is an attempt by the Government to dodge responsibility for the consequences of its condemnation, on the ground that it need compensate respondent only for the value of the bare space which it received because, regardless of what it took and respondent's loss, that is all it kept and used. It is true that the Government did not actually appropriate or take the equipment, facilities and inventory by means of which respondent used the property condemned by the Government; if it had done so for the purpose of adopting them to its own ends and use, there would be little question of its obligation for just compensation for their value.[4] It is equally true, however, that it is not on that basis that respondent seeks compensation in this case. The compensation in question is for the loss resulting from the Government's destruction and expropriation of respondent's use and occupancy of the property which the Government condemned for its own use. As well might the Government argue that, if it requisitioned only the land and not the building upon it, the expense of removing the unwanted building would be a mere consequential damage not recoverable by the owner without express statutory authority. Such a novel doctrine would be an easy, if grotesque, road to condemnation since land improvements of no use to the Government are often many times more valuable than the land upon which they stand. While in some of the cases stress is laid upon fixtures, separable or not from the land, it is significant that the Fifth Amendment makes no distinction between real and personal property

[4] *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Phelps v. United States*, 274 U. S. 341; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *DeLaval Co. v. United States*, 284 U. S. 61.

and requires that just compensation be made for any property taken.

That the Government, having no use for the equipment or such facilities as respondent employed there, did not want or take them for its own ends, or that it is not therefore called upon to pay compensation for them on that basis, does not alter the fact that the condemnation appropriated respondent's use and possession and it thereby sustained a loss that would not otherwise have been imposed on it, to the extent of the cost and expense of demolishing and removing the equipment and facilities. If it is to be put in as good position as it would occupy if the property had not been taken for the Government's temporary use, it should be compensated for that loss, without regard to the question whether or not the result would be to compel the Government to pay for something which, in contrast with the case of taking the equipment and facilities in place for its own use, contributed no positive value to the unoccupied space it received.

The Government's position to the contrary completely ignores the important consideration that it is the owner's loss, not the worth to the taker (of the bare space, in this instance), which is the measure of the just compensation capable of giving the full and perfect equivalent in money of the property taken and thus making the owner pecuniarily whole in respect of that which was taken from it. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *United States* v. *Miller*, *supra*, p. 375. This is consistent with the equitable principles on which just compensation rests. By the same token that gain to the taker will not be permitted to redound pecuniarily to the owner's benefit by enhancing compensation for the loss, so the owner's loss will not be diminished by reason of the fact the loss involves an element from which the taker receives no specific benefit, as distinguished from the benefit inherent in the right to appropriate property to the taker's own use. The owner's loss is no less a loss for

which he should be compensated, merely because the taker cannot point to a benefit which matches or parallels every element of the owner's loss.

Under the principle involved here, just compensation for the owner's loss is the price the taker must pay for the benefit which accompanies exercise of the condemnation prerogative, without regard to any balancing of owner's loss and taker's gain. The exercise of the right to take exhausts the benefit enjoyed by the taker in the power of compulsion which resides in the prerogative; thereafter, the determination of just compensation for the taking should, in the very nature of the concept, be free of any consideration of further benefit to the taker. As well might the Government, if conceivably it were necessary that it compel the sale to it of a quantity of bananas, to use the homely example of a wartime scarce commodity, expect a reduction in price to allow for the useless skins, as to escape payment of provable damage by way of compensation for condemning respondent's use and possession of the property in this case on the basis that only the unoccupied space, not respondent's use of the space, was of any value to the Government for its own use.

Since the Government's condemnation of the property involved the expropriation and destruction of respondent's use in the very process of acquiring the unoccupied space it desired for its own use, and respondent lost both space and use, it should be compensated, to the extent of the cost and expense of demolition and removal, for the value of its loss of use and possession, even if the Government gained nothing from respondent's loss of use. As a matter of fact, while respondent has, for the sake of argument, assumed the absence of any specific benefit to the Government, the Government's objection to payment of compensation for the cost and expense of removal becomes even more indefensible if, abandoning that assumption, this Court is persuaded, as respondent is, that the Government benefited tangibly by respondent's removal of its equipment and inventory. Such removal involved

a cost and expense which inhered in the Government's condemnation of the temporary use of property burdened with respondent's use and occupancy. The benefit derived by the Government from the removal is not altered by the fact that respondent conducted it and initially incurred the cost and expense involved therein.

Before leaving this examination of the question raised by the Government concerning consequential damages, respondent deems it pertinent to add that, even if the compensation in question were considered as in the nature of such damages, it may nevertheless be recognized as recoverable on the same basis as so-called severance damage, as illustrated by the statement in *United States* v. *Miller*, *supra*, that (p. 376) "* * * If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage * * *".

Although such severance damage is not without a suggestion of consequential damage, it is permitted under one of the working rules which the courts have adopted, as this Court said in that case, to do substantial justice in eminent domain proceedings. In this case, for the same reason that the owner of a single tract is allowed to recover for the effect of the taking of only a portion of the tract on the value of what is left, respondent is entitled to be compensated for the consequences of a condemnation which, because it throws out respondent's use and occupancy of the property only for the duration of the Government's temporary use, compels respondent thereafter to reoccupy and resume use for the remaining term of the lease. The value of its right, prior to condemnation, to uninterrupted use and occupancy during the remaining six years of the lease term was diminished by the cost and expense, for which the condemnation of the temporary use was responsible, of moving out and then resuming

use of the property upon termination of the Government's temporary use and occupation of it.

Conclusion.

Respondent submits that, if it is to be made whole by a recovery of the just compensation to which it is entitled within the established meaning of the term, it should be accorded the right and opportunity to prove the cost and expense which constitute and measure the loss sustained by it as a result of the expropriation of its use and occupancy of the condemned property for the Government's temporary use. A sound, reasonable and just application of the principle which actuates the right to just compensation invites the conclusion that the damage or loss to the condemnee, to the extent of the cost and expense of removing all physical embodiments of the expropriated use and occupancy, is not to be excluded from consideration of the just compensation recoverable for the property taken.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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